1-238

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

No. ~~319.~~ 94

THE MUTUAL BENEFIT LIFE-INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

HATTIE B. TISDALE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

FILED NOVEMBER 5, 1873,

SUPREME COURT OF THE UNITED STATES

No. 319.

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1 Pleas in the circuit court of the United States of America for the district of Iowa, at a term thereof begun and holden at the United States court room in the city of Des Moines, in the State of Iowa, and district aforesaid, on the second Monday of May, it being of the 12th of May, A. D. 1873, before the Hon. John F. Dillon, United States circuit judge for the eighth circuit, and Hon. James M. Love, United States district judge for said district of Iowa.

2 Be it remembered that heretofore, to wit, on the seventh day of May, A. D. 1870, The Mutual Benefit Life-Insurance Company, by its attorneys, Messrs. Crane, Adams & Robinson, filed in the office of the clerk of the United States circuit court for the district of Iowa, a transcript from the district court of Jackson County, State of Iowa, wherein Hattie B. Tisdale was plaintiff, and The Mutual Benefit Life-Insurance Company defendant, which said transcript is in words and figures following, to wit:

3 District court.

STATE OF IOWA, *Jackson County:*

Copies of all process', pleadings, testimony, depositions, and proceedings in the case pending in the district court of Jackson County, and State of Iowa, on change of venue from the district court of Dubuque County, Iowa, wherein Hattie B. Tisdale is plaintiff, and the Mutual Benefit Life-Insurance Company is defendant.

4 *Original notice.*

In the district court of Dubuque County, Iowa. Term November, A. D. 1867.

STATE OF IOWA, *Dubuque County, ss:*

HATTIE B. TISDALE, PLFF., *vs.* THE MUTUAL BENEFIT LIFE-INSURance Company, deft. } Petition.

To the Deft.:

You are hereby notified that there will be, Oct. 15th, 1867, on file in the office of the clerk of the district court of Dubuque County, Iowa, a petition of Hattie B. Tisdale claiming of you $2,000.00, and interest from September 24th, 1866, on policy No. 37,072, issued by you March 1st, 1866, on the life of Edgar Tisdale, of Dubuque, Iowa, and that unless you appear thereto, and defend, on or before noon of the second day of the November term, 1867, of said court, being the day of November, 1867, default will be entered against you and judgment rendered thereon.

ALLISON, CRANE & ROOD,
Attorneys for Plaintiff.

5 I, S. M. Case, agent of the Mutual Benefit Life-Insurance Company of New Jersey, hereby acknowledge the service of the above notice for and in behalf of said company.

J. M. CASE,
Agent for Northern Iowa.

SEPT. 28th, 1867.

On the back of said original notice appears the following endorsement:

Filed Oct. 2, '67. H. A. Rooney, clerk.

And on the 2nd day of Dec., A. D. 1867, the following petition was filed, to wit:

Petition.

District court, Dubuque County.

HATTIE B. TISDALE, PLFF.,
vs.
THE MUTUAL BENEFIT LIFE-INSURance Company, deft.

The plff. in the above-entitled action, complaining against the deft. therein named, for cause action alleges:

That on or about the 1st day of March, 1866, said deft. was a
6 corporation existing under and by virtue of the laws of the State of New Jersey, and had its principal place of business in Newark, in said State. That on or about said first of March, said deft. issued its policy No. 37,072 to said plff., whereby, for a valuable consideration by her paid, said deft. insured the life of her husband, Edgar Tisdale, for the term of life, and agreed to pay said plff. the sum of two thousand dollars within ninety days after the notice and proof of his death. That said Edgar Tisdale departed this life on or about the 24th of September, 1866; that said plff. is still the lawful owner and holder of said policy, and the sum is still unpaid, and the amount thereof owing and due to her.

And said plff. further alleges that due notice and proof of the death of said Edgar Tisdale was served on and furnished to said deft. more than ninety days prior to the commencement of this action.

7 Exhibit A, hereto annexed, is a copy of said policy.

Wherefore said plff. demands judgment against said deft. for the sum of two thousand dollars, with interest from Sept. 24, 1866, besides the costs of this action.

ALLISON, CRANE & ROOD,
Plff.'s Attys.

STATE OF IOWA, *Dubuque County, ss:*

I, Hattie B. Tisdale, being duly sworn, depose and say that I am the plff. in the above action; that the allegations in the foregoing petition are true, as I verily believe.

HATTIE B. TISDALE.

Subscribed and sworn to before me by Hattie B. Tisdale, this 2nd day of October, 1867.

Witness my hand and notarial seal.

[L. S.] T. PALMER ROOD,
Notary Public.

8 On the back of said petition appears the following indorsement:

Filed Dec. 2, '67. H. A. Rooney, clerk.

Also appears the following answer to said petition:

Answer.

District court, November term, 1867.

STATE OF IOWA, *Dubuque County:*

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT INSURANCE COMPANY.

This defendant answers plff.'s petition, and says:

1st. This defendant denies that on or about the 24th Sept., 1866, Edgar Tisdale departed this life.

2nd. This defendant denies that due notice and proof of the death of said Edgar Tisdale was served on and furnished to this defendant more than ninety days prior to the commencement of this action.

3. Deft. asks judgment.

DE WITT C. CRANE,
Atty. for Deft.

W. T. BAKER,
Counsel.

9 STATE OF IOWA, *Dubuque County, ss:*

I, De Witt C. Crane, being duly sworn, on oath say that I know the statements of foregoing answer, and that they are true, as I verily believe.

1. I verily believe Edgar Tisdale did not depart this life on or about the 24th of Sept., 1866, and so swear, because, as the attorney of defendant, I have personally seen parties in Chicago who last saw him there in Sept., 1866, and am in possession of all the information or knowledge which such parties have of him, from information obtained of detectives in Chicago, Ills., and officers of the police in said city who investigated the circumstances of his disappearance or departure from that city; from information obtained from others who know the reasons of his leaving Dubuque to go in business in Minnesota, and the reasons for his leaving Minnesota as he did, and from information from parties who know Tisdale's relations with the family of his wife, plaintiff herein, and from information from those who know Tisdale's
10 personal habits, his mental disposition, his temper, and desires, as to manner of live.

2. I verily believe due proof and notice of his death has not been given, from information obtained from agents of this defendant.

3. I make this verification instead of agents of defendant because I am more fully informed than they are and better able to come to a belief as to whether Edgar Tisdale died on or about Sept. 24, 1866, or not.

DE WITT C. CRANE.

Subscribed and sworn to before me this 16th day of November, A. D. 1867.

As witness my hand and seal.

[L. S.] WM. L. BRADLEY, *N. P.*

On the back of said answer appears the following indorsement:

Filed Nov. 16, '67. Wm. McLean, dept. clerk.

11 Also appears the following affidavid for change of venue :

District court, Dubuque County.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE COMpany.

STATE OF IOWA, *Dubuque County, ss* :

I, Hattie B. Tisdale, being duly sworn, depose and say that I am the plff. in the above-entitled action; that James Bent, judge of said court, is so prejudiced against me that I cannot obtain a fair trial of said action before him; that said prejudice was not known to me until after said action was continued the last time.

HATTIE B. TISDALE.

Subscribed and sworn to before me by Hattie B. Tisdale, this Feby. 1st, 1869.

Witness my hand and notarial seal.

[L. S.] T. PALMER ROOD,
Notary Public.

12 The plff. in the above-entitled action moves the court for a change of venue to some county out of this judicial district.

ALLISON, CRANE & ROOD,
Plffs.' Attys.

On the back of said affidavit appears the following indorsement:
Filed Feby. 2, '69. Wm. McLean, deputy clerk.

13 In dist. court of Dubuque County, Iowa, Tuesday, Dec. 24th, 1867.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT L. INS. COMPANY. } 3424. Law.

Cause continued.

In dist. court, Friday, March 6th, 1868.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT L. INS. COMPANY. } 3424. Law.

This cause coming up on plaintiff's motion to strike certain portions of the depositions of Moore, Elliott, Hale and Simpson from said depositions, the court sustains the exceptions as to answers to 9th and 11th interrogatories of each witness. Defendants except to ruling. Continued as by stipulation.

In dist. court, Dub. Co., Wednesday, June 10th, 1868.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INS. COMPANY. } 3423. Law.

Continued by consent.

14 In dist. court, Dub. Co., Nov. 28, 1868.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE CO. } 3424. Law.

Continued.

In the dist. court, Dub. Co., Feby. 6th, 1869.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INS. CO. } 3424. Law.

This cause coming up on the motion of plff. for change of venue, the court grants the motion and orders the venue to be changed to the county of Jackson, and that the clerk certity the transcript accordingly.

STATE OF IOWA, *Dubuque County, ss*:

I, H. A. Rooney, clerk of the district court, in and for Dubuque County, Iowa, do hereby certify that the foregoing papers areall the original papers in the above-en titled cause, and also a compared transcript of the record entries in said case.

15 Witness my hand and the seal of said court hereto affixed, this 19th day of November, A. D. 1869.

[L. S.] H. A. ROONEY,
Clerk Dist. Court.

[U. S. rev. 5 cts., H. A. R., Feb. 19, '69.]

District court, Dubuque County.

HATTIE B. TISDALE
vs.
THE CONNECTICUT MUTUAL LIFE-INSURance Co. } 3424.

HATTIE B. TISDALE, ADMX. OF E. TISDALE, decd.,
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE Company. } 3436.

It is hereby stipulated and agreed that any and all depositions and other written evidence taken by the plff. in either of the above-entitled actions may be used as evidence in both of said actions, subject only to objections for irrelevancy or inco'petency.

DE WITT C. CRAIN,
Atty. of Mutual Benefit Life-Insurance Company.
ADAMS & ROBINSON,
Attys. for the Conn. Mutual Life-Ins. Company.
CRANE & ROOD,
Plffs.' Attys.

Filed Mch. 30th, '70. E. J. Holmes, clerk.

16 I, J. N. Hill, of Dubuque, Iowa, who has become surety on a bond made by the Mutual Benefit Life-Insurance Company of Newark, N. J., as principal, and which bond is to be offered for the approval and acceptancy of the district court of Jackson Co., Iowa, on removal of a suit therein pending, wherein Hattie B. Tisdale is plaintiff and said co. defendant, being duly sworn, on oath say that I am a resident of Dubuque Co., Iowa, and have property in this State liable to execution equal to and more than the sum secured by said bond, and I am worth double the amount to be secured beyond the amount of my debts.

J. N. HILL.

Subscribed and sworn to before me this 28th March, A. D. 1870, as witness my hand and notarial seal.

[L. S.] CHARLES J. ROGERS,
Notary Public of Iowa in & for Dubuque County.

17 STATE OF IOWA, *Dubuque County:*

District court, Jackson Co., March term, 1870.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE COMpany.

The undersigned, J. N. Hill, of Dubuque, Dubuque County, Iowa, acknowledges himself to be, and is hereby, bound unto Hattie B. Tisdale, plaintiff in the above suit, in the penal sum of two thousand dollars, for the payment of which, well and truly to be made, he binds himself and his legal representatives firmly by these presents.

The condition of this obligation is such, that whereas the defendant in the above-entitled suit *have* filed a petition in the district court of said county, wherein said suit is now pending, asking, for reasons stated in said petition and on affidavit filed in support of the same, as provided by acts of Congress of the United States for the removal of said suit into the next circuit court of the United States for the district of

18 Iowa: Now, in case said defendant shall enter in such circuit court on the first day of its session copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and shall also there appear on the first day of the session of said circuit court, and enter special bail, *was* originally required, and do such other appropriate acts as by act of Congress of the United States, July 27, 1866, are required to be done upon the removal of a suit into the United States courts, then this obligation to be null and void; otherwise to be and remain in full force and effect.

Signed at Dubuque, Iowa, this 29th March, A. D. 1870.

J. N. HILL.

This bond approved by me this 30th March, 1870.

J. SCOTT RICKMAN,
Judge 7th Judicial Dist. of Iowa.

Filed March 30th, '70. E. J. Holmes, clerk.

19 March term, A. D. 1870.

STATE OF IOWA, *Jackson County:*

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE CO.

I, De Witt Crane, being duly sworn, on oath say that I am a resident of Dubuque, Iowa, and one of the defendant's attorneys; that I know plaintiff, and that she is a citizen of the State of Iowa, residing at Dubuque, in said State; and that defendant is a corporation, organized under the laws of the State of New Jersey, doing business in Newark, in said State, and is a citizen of that State.

DE WITT C. CRANE.

Subscribed and sworn to by De Witt C. Crane before me this 30th day of March, A. D. 1870.

E. J. HOLMES, *Clerk.*

Filed March 30th, '70. E. J. Holmes, clerk.

20 *Petition.*

District court, March term, 1870.

STATE OF IOWA, *Jackson County:*

HATTIE B. TISDALE, PLFF.,
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE COMpany.

To said Court:

Your petitioner, said defendant, asks for an order that the above-entitled suit be removed into the next circuit court of the United States for the district of Iowa, because—

I. Defendant makes and files herewith an affidavit, as annexed hereto, stating, among other things, that said defendant has reason to believe, and does believe, that, from prejudice and local influence, said defendant will not be able to obtain justice in such State court.

II. Plaintiff was, when said suit was commenced, continues to be, and still is, a citizen of the State of Iowa; and defendant was at the same time, and continues to be, and still is, a citizen of the State of New Jersey.

III. The matter in dispute exceeds the sum of $500.00, exclusive of costs, and there has been no final trial or hearing of said
21 suit.

Petitioner offers good and sufficient surety for doing all required by act of Congress March 2d, 1867, and act July 27th, 1866, for the approval and acceptancy of this court.

DE WITT C. CRANE,
Atty. for Deft.

To Messers. CRANE & ROOD, *Attys. for Plff.:*

The foregoing petition will be called up for hearing on the 1st day of the March term, 1870, district court, Jackson Co., Iowa, or as soon thereafter as counsel can be heard.

DE WITT C. CRANE.

We accept service of the above notice, with copy of petition and copy of affidavits annexed, being affidavits in support of petition, and also copy of the bond and surety to be offered by defendants, as referred to in said petition.

CRANE & ROOD,
Attys. for Plff.

DUBUQUE, *March 24th*, 1870.

22 (Same title.)

STATE OF IOWA, *Dubuque County, ss:*

I, De Witt C. Crane, being duly sworn, on oath say that I am deft.'s atty.; that plaintiff was when said suit was commenced, has continued to be, and still is, a citizen of the State of Iowa; that defendant was when said suit was commenced, has continued to be, and still is, a citizen of the State of New Jersey.

DE WITT C. CRANE.

Subscribed and sworn to before me this 15th March, 1870, as witness my hand and notarial seal.

WM. L. BRADLEY, *N. P.*

District court, March term, 1870.

STATE OF IOWA, *Jackson Co.:*

HATTIE B. TISDALE, PLFF.,
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE CO., deft.

STATE OF NEW JERSEY,
County of Essex & City of Newark, ss:

I, Lewis C. Grover, being duly sworn, on oath say that I am a citizen of New Jersey, residing in said county and city, and am president of
23 the Mutual Benefit Life-Insurance Company, said defendant in the suit as above entitled, which said suit is a controversy between said plaintiff, Hattie B. Tisdale, who was when said suit was commenced, and all the time since then has been, and still is, a citizen of the State of Iowa; that said defendant is an incorporation, duly organized, before the commencement of said suit, under the laws of the State of New Jersey, and state is so organized, and when this suit was commenced, was and all the time since then has been, and still is, a citizen of the State of New Jersey, doing business at Newark, in said State; that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs; that there has been no final trial or hearing of said suit; that said defendant has reason to believe, and does believe, and I have reason to believe, and do believe, that, from prejudice or local influence, said defendant will not be able to obtain justice in such State court.

LEWIS C. GROVER.

24 Subscribed and sworn to by Lewis C. Grover, before me, William B. Grover, a notary public in said city of Newark, Essex County, and State of New Jersey, and residing in said city, at my office

in said city, this 18th day of February, A. D. 1870, as witness my hand and notarial seal.

[L. S.] WM. B. GROVER,
Notary Public.

Filed Mch. 29, '70. E. J. Holmes, clk.

District court.

STATE OF IOWA, *Jackson County:*

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE CO.

This 30th March, A. D. 1870, defendant's petition for the removal of the above-entitled suit into the next circuit court of the United States for the district of Iowa came on to be heard, and said petition and affidavits in support of the same are read and submitted to the
25 court, and the bond as required by law, in the penal sum of $2,000, signed by J. N. Hill, as surety, as filed, is also submitted to the court, who accepts and approves the security and bond, and thereupon orders that said suit be and stand removed into the next term of the circuit court of the United States for the district of Iowa, and that copies of all process, pleadings, depositions, testimony, and other proceedings, in said suit be made out.

District court.

STATE OF IOWA, *Jackson County:*

I, E. J. Holmes, clerk of the district court, do hereby certify that the foregoing are true, correct, and compared copies of all the process, pleadings, depositions, testimony, and of all the proceedings in the suit of Hattie B. Tisdale vs. The Mutual Benefit Life-Insurance
26 Company heretofore pending in said county, as the same appears on file and of record in the district court of said county and in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Andrew, this 29th day of April, A. D. 1870.

[L. S.] E. J. HOLMES, *Clerk D. C.*

(Endorsed:) Filed May 7, 1870. George B. Corkhill, clerk.

27 And afterwards, to wit, on the tenth day of May, A. D. 1870, there was filed in said clerk's office an appearance of the defendants in this cause, which said appearance is in words and figures following, to wit:

28 Circuit court of the United States, district of Iowa, May term, A. D. 1870.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE COMPANY.

Removed from district court Jackson Co., Iowa, on petition of defendant.

To the clerk of the circuit court of the United States, district of Iowa:

Defendant in above cause, which has been removed into this court

from the district court of the State of Iowa for Jackson County, on petition of said defendant, on this 10th May, A. D. 1870, enters copies of all process, pleadings, depositions, testimony, and all proceedings in the above cause as of record and had in the State court. and also enters its appearance and appears on this 10th May, 1870, as defendant in this court in above suit.

DE WITT C. CRANE,
ADAMS & ROBINSON,
Attys. of Deft.

DES MOINES, IOWA, *May 10th*, 1870.

29 And afterwards, to wit, on the 26th day of May, 1870, there appears on the records of the proceedings of said court the following entry, to wit:

Circuit court of the United States, district of Iowa, May term, 1870

THURSDAY, *May* 26, 1870.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE CO. } No. 873. Law.

This day this cause, coming on for hearing, was, by consent of parties, continued, and the motion to sup'ress depositions reserved for further hearing.

30 And afterwards, to wit, at the October term of said court, there appears in the records of the proceedings thereof the following entry, to wit:

Circuit court of the United States, district of Iowa, October term, 1870.

FRIDAY, *November* 4, 1870.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE CO. } No. 873. Law.

Now, on this day, this cause coming on for a hearing, the plaintiff appearing by Crane & Rood, and the defendant by De Witt C. Crane and Adams & Robinson, the same is continued.

31 And afterwards, to wit, on the 30th day of May, 1871, there appears on the records of the proceedings of said court for said district the following entry, to wit:

Circuit court of the United States, district of Iowa, May term, 1871.

TUESDAY, *May* 30, 1871.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE CO. } No. 873. Law.

This day this cause comnig on for hearing, the plff. appears by Crane & Rood, and deft. by Crane & Adams & Robinson, the same is continued.

32 And afterwards, at the October term, 1871, of said court, on the records of the proceedings thereof, there appears the following entry, to wit:

Circuit court of the United States, district of Iowa, October term, 1871.

WEDNESDAY, *Oct. 25th*, 1871.

HATTIE B. TISDALE
vs.
MUTUAL BENEFIT LIFE-INSURANCE COMPANY. } No. 873. Law.

This cause coming on for hearing, plff. appears by Crane & Rood, and deft. by Adams & Robinson, the same is continued as per stipulation of parties on file.

33 And afterwards, at the May term, 1872, of said court, there appears, in the records of the proceedings thereof, the following entry, to wit:

Circuit court of the United States, district of Iowa, May term, 1872.

FRIDAY, *May* 24, 1872.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE CO. } No. 873. Law.

This day this cause coming on for hearing, plaintiff appears by Shirras & Rood, and defendant by Crane & Adams, and there came a jury of twelve good and lawful men, to wit, John L. Smith, W. H. Corkhill, J. F. Abraham, Levi J. Evans, Allen Vinton, A. T. Johnson, N. G. Hedges, A. C. Sheldon, W. R. Douglas, Thos. Griffith, D. T. Durham, J. P. Moshier, who were duly empanneled and sworn to well and truly try
34 this cause, and the issues joined, and a true verdict render according to the law and evidence given in court; and after they had heard the evidence they were excused until to-morrow morning at 9 o'clock.

35 And on the 24th day of May, 1872, the same being of the May term, 1872, of said court, there appears on the records of the proceedings thereof the following entry, to wit:

Circuit court of the United States, district of Iowa, May term, 1872.

FRIDAY, *May* 24, 1872.

HATTIE B. TISDALE
vs.
MUTUAL BENEFIT LIFE-INSURANCE COMPANY. } No. 873. Law.

This cause coming on for further hearing, parties appear by their attorneys, and the jury came the same as yesterday, and they, having heard the argument of counsel and the charge of court, retired to a private room, under charge of a sworn officer, to consider their verdict, and, after some time spent in deliberation thereon, they return into open

court and report that they are unable to agree; and thereupon it was ordered by the court that they be discharged from the further consideration of this case.

36 And on the 23d day of October, 1872, the same being of the October term, 1872, of said court, there appears in the records of the proceedings thereof the following entry, to wit:

Circuit court of the United States, district of Iowa, October term, 1872.

WEDNESDAY, *Oct.* 23, 1872.

HATTIE B. TISDALE
vs.
GUARDIAN MUTUAL LIFE-INSURANCE CO. } No. 873. Law.

This cause coming on for hearing, this day, was continued and specially assigned for trial on the 2nd day of next term of this court.

37 And on the 14th day of May, 1873, the same being of the May term, 1873, of said court, there appears in the records of the proceedings of said cause the following entry, to wit:

38 Circuit court of the United States, district of Iowa, May term, 1873.

WEDNESDAY, *May* 14, 1873.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INS. CO. } No. 873. Law.

This cause came on for trial on yesterday, and the plaintiff appeared by Shiras & Rood, and defendant by Crane & Adams, and there came a jury of twelve good and lawful men, to wit, Luke Palmer, Christa Wright, W. H. H. Gable, Andrew Simpson, T. A. Prest, Wm. Sharon, R. Eddy, M. G. Tullis, C. D. Skinner, Hugh R. Lyon, H. Wilkinson, Geo. E. Kennedy, who were duly empan*nelled* and sworn to well and truly try the issues in this cause, and a true verdict render according to the law and evidence given them in court, and, after hearing a statement of the case and a part of the evidence, they were excused until
39 9 o'clock this morning; and on this day the cause came on for further hearing, and the parties appear by their attys., and the jury came the same as yesterday, and they, having heard the rest of the evidence and arguments of counsel, were excused until 8½ o'clock to-morrow morning.

40 And afterwards, to wit, on the 15th day of May, 1873, there was filed in said clerk's office the following stipulation, to wit:

41 United States circuit court, district of Iowa.

H. B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE COMpany.

It is hereby stipulated and agreed, in the above-entitled action, as a fact, that while Edgar Tisdale, the husband of the plaintiff in said

action, resided in the city of Dubuque, State of Iowa, he was regarded as a man of good character and possessed a good reputation.

Dated Sept. 14th, 1872.

ADAMS & ROBINSON,
Attys. for Deft.

Filed May 15, 1873.

GEORGE B. CORKHILL, *Clerk.*

42 And on the 15th day of May, 1873, the same being of the May term, 1873, of said court, there appears on the record of the proceedings thereof the following entry, to wit:

Circuit court of the United States, district of Iowa, May term, 1873.

THURSDAY, *May* 15, 1873.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INS. CO. } No. 873. Law.

This cause came on this day to be further heard; the parties appear by their attorneys, and the jury came the same as yesterday, and they having heard the charge of court, they retired to a private room under charge of a sworn officer & considered their verdict, and after having spent some time in deliberation thereon they return into open court the following verdict, to wit, "We, the jury, find for the plaintiff
the sum of two thousand seven hundred and five dollars
43 and sixty cents. (Signed) R. Eddy, foreman." It is therefore considered and adjudged that plaintiff, Hattie B. Tisdale, have and recover of, and from, the Mutual Benefit Life-Ins. Co. the said sum of two thousand seven hundred and five dollars and sixty cents, with interest, and costs of suit taxed at $, and that execution issue therefor. The Hon. John F. Dillon took no part in the trial of this cause.

44 And afterwards, to wit, on the 23d day of May, A. D. 1873, the defendants filed in the clerk's office of said court its bill of exceptions, which said bill of exceptions is in words and figures following, to wit:

45 *Bill of exceptions.*

Circuit court U. S., May term, 1873.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE COMpany.

This was an action upon a policy of life-insurance issued by defendant to plff. upon the life of her husband, Edgar Tisdale, on the first day of March, 1866, in which defendant promised to pay to plaintiff the sum of $2,000 within ninety days after due notice and proof of the death of the said Edgar Tisdale.

It was alleged by plaintiff that Edgar Tisdale departed this life on or about the 24th day of September, 1866; that due notice and proof of the death of said Edgar Tisdale was served on and furnished to said defendant more than ninety days prior to the commencement of this action, and that the sum promised to be paid had not been paid, but was still due & unpaid.

Defendant admitted in its answer the issuance of the policy
46 as alleged, but denied that said Edgar Tisdale was dead, and denied that due notice and proof of the death of said Tisdale had been given and furnished as alleged.

The cause was tried to a jury on the 13th, 14th, & 15th days of March, 1873, at the May term of said court.

Upon said trial of said cause the defendant admitted in open court that prior to April 1st, 1867, plff. served upon and furnished to defendant the papers hereinafter set out as notice and proof of the death of said Edgar Tisdale.

The plaintiff then introduced evidence tending to show that the defendant did not at any time and had not at any time made any objection whatever to said papers, but that defendant declined and refused to pay plaintiff the amount specified in said policy of insurance, because defendant did not believe Edgar Tisdale was dead.

47 Said papers were in words and figures as follows, to wit:

DUBUQUE, IOWA, *Feby. 4th*, 1867.

SIR: Please take notice that Edgar Tisdale, whose life was insure' by policy No. 37072 for $2,000.00, issued by the Mutual Benefit Life-Insurance Company of Newark, New Jersey, to the undersigned, departed this life on or about the 24th day of September, 1866.

Application will be made when the proper evidence is procured for the payment of the amount stipulated in said policy.

HATTIE B. TISDALE.

To S. M. CASE,
Agent Mutual Benefit Life-Ins. Co.

Proof of identity and age.

I, John H. Bartlett, do hereby certify that I was personally acquainted with Edgar Tisdale, who died on or about the 25th day of September, 1866; that he was the identical person insured in the Mutual Benefit Life-Insurance Company under policy No. 37072; that his
48 age at the time of his death was twenty-eight years & nine months of age; and that my knowledge of his age is obtained from his own statements and the statements of his brother, Luther Tisdale, and his wife.

JOHN H. BARTLETT.

Sworn and subscribed before me the 26th day of March, 1867, at Dubuque, Iowa.

T. PALMER ROOD,
Notary Public.

[5c. U. S. stamp, cancelled.]

STATE OF IOWA, *Dubuque County, ss:*

I, Angie B. Rood, being duly sworn, depose and say that, for nearly three years prior to the 25th day of September, 1866, I had been inti-

mately acquainted with Edgar Tisdale, late of Dubuque, Dubuque County, Iowa, deceased, the identical person assured in the Mutual Benefit Life-Insurance Company, under policy No. 37072; that, in October, 1863, said Tisdale married my sister, Hattie Bartlett,
49 and thereafter, until the month of May, 1866, said Tisdale and his wife lived at my father's house; during all of which time I lived there also; that I was very well acquainted with the feelings and happiness existing between them, and know of the felicity of their relationship and companionship; that, during all of said time, they were on the most friendly and happy terms; and said Edgar was uninterruptedly devoted to his said wife, and paid her those agreeable attentions which render married life felicitous, and was ever solicitous respecting her mental and physical comfort; that he very rarely permitted anything but business to detain him from her society, and always appeared happy and contented when in her company. And I further say that, during the whole of said period, I had the most favorable opportunity for knowing the state of feeling existing between the said Tisdale and his said wife; that is to say, I was very frequently in my sister's
50 apartments when her husband was present—many times every day, and I was on terms of the warmest intimacy and sisterly confidence with her.

ANGIE B. ROOD.

Subscribed and sworn to by Angie B. Rood, before me, this 26th day of March, 1867. Witness my hand and notarial seal.

[L. S.] T. PALMER ROOD,
Notary Public.

[5c. U. S. stamp, cancelled.]

STATE OF IOWA, *Dubuque County, ss:*

I, T. Palmer Rood, being duly sworn, depose and say that I am a resident of Dubuque, Iowa; that, on the 3rd day of Oct., 1866, I went to Chicago, Ill., in search of one Edgar Tisdale, with whom I had for a long time been acquainted, at the instance and request of his wife, under the impression that an unexplained absence was due to some calamitous occurrence.

51 Upon arriving at Chicago I examined the books of the Sherman House, (a hotel in said city,) from which & inquiries of the proprietors and employees, I learned that said Tisdale had not been seen at said Sherman House since about the 24th or 25th of Sept. previous; also that his baggage was left there and his bill remained unpaid; that I paid said bill, and received what said proprietors informed me was the baggage left in said Tisdale's room, which I conveyed to said Dubuque, and delivered to his wife, Hattie Tisdale, to wit, a small satchel.

I ascertained that said Tisdale had paid all the merchants to whom he was indebted for goods purchased, and whose receipts I afterwards found in said satchel, dated Sept. 24th, 1866, amounting to about $60. From the teller of a bank, I think Trukham's, I learned that he (said Tisdale) had obtained from there $2,000.00 in currency.

52 I further say that I remained in said Chicago for three days, making diligent search for said Tisdale, employing the city police and Turtle, Kensie & Co., detectives, circulating photographs of him, and having published in all the city papers his description and the matter of disappearance. That said detectives and police were continued in employ for some time thereafter; that, afterwards, and on or about

the day of October, 1866, there was published in two of the daily papers of said Chicago an offer of a reward of $1,000 for the production of the body of said Tisdale.

Notwithstanding these efforts, said Tisdale has not been found, neither has any trace of him been discovered to my knowledge. I further say that the deportment of said Tisdale during the entire period of my acquaintance with him was correct and in every respect consistent with uprightness, and his reputation at the place of his residence was unblemished.

53 T. PALMER ROOD.

Subscribed & sworn to by T. Palmer Rood before me this 14th day of November, 1866. Witness my hand and notarial seal.

[L. S] WM. L. BRADLEY,
Notary Public.

STATE OF IOWA, *Dubuque County, ss :*

I, Louise A. Muller, being duly sworn, depose and say that on the 22nd day of September, 1866, I was residing in Owatonna, Steele Co., State of Minnesota; that at that time I was, and for six months had been, acquainted with Edgar Tisdale, late of Dubuque, Iowa, and during three months of that time had been in his employ to attend to housework; that in the month of May, 1866, said Edgar Tisdale removed from said Dubuque to said Owatonna, and there engaged in the mercantile business; that on or about the 20th of said September, said Tisdale sold his stock in trade & other property, and on said
54 22nd of Sept., left Owatonna for Chicago, Ills. Immediately prior to his leaving I had some conversation with him, in which he said he was going to Chicago to settle some business, thence to Dubuque City, Iowa, as soon as the following Wednesday, (the 26,) to visit his friends; thence back to said Owatonna, so as to arrive about ten days after said 22nd. For two days prior to leaving Owatonna he had expressed to me the same intentions, and appeared very anxious to perform the journey in the shortest practicable time. During all the time after about the 1st of September, 1866, the wife of said Tisdale was at Dubuque, Iowa, on a visit at her father's; and I further say that I have not seen or heard of said Tisdale since said 22nd of September.

LOUISE A. MULLER.

Subscribed & sworn to before me, by Louise Muller, this 16th day of November, 1866.

Witness my hand and notarial seal.

[L. S.] T. PALMER ROOD,
Notary Public.

[5-c. stamp.]

55 STATE OF ILLINOIS, *Cook County, ss :*

I, J. S. Dennis, being duly sworn, depose and say, that on the 25th day of September, A. D. 1866, I resided in Chicago, Cook County, Illinois, and was engaged in manufacturing, at 43 and 45 Franklin street, Chicago, Ill. That on the aforesaid 25th day of September, Edgar Tisdle, formerly of Dubuque, Iowa, a person whom I have well known for the seven years last past, came into my office, dined with me at the "Briggs House," so called, and at about 3 o'clock p. m. parted from me, saying he was going to the "Sherman House," so called, & that he

intended going to Dubuque, Iowa, that night or the next; since which parting I have not seen or heard from the said Tisdale. I further depose and say that, being notified that he had not reached Dubuque, I called at the Sherman House, and learned that he had not been
56 there for several days, that his bill was not paid, and that he had left baggage in his room; that in company with T. P. Rood, of Dubuque, Iowa, I asked for and obtained said baggage, consisting of a hat and a satchel. That said satchel was found to contain a few articles of clothing, a navy revolver, two or three books & papers, & memoranda which were in the handwriting of said Tisdale; perhaps a few other articles which now escape my memory. I further depose and say that since that time I have taken much pains to learn what has become of said T., under direction of the relatives and friends of the said T. I have engaged the services of three companies of detectives, and offered in the name of said relatives a reward of one thousand dollars for the discovery of said T., and that thus far I have learned nothing.

J. S. DENNIS.

Subscribed and sworn to before me this 12th day of March, A. D. 1867.

[L. S.] W. F. WENTWORTH,
Notary Public.

57 STATE OF ILLINOIS, *Cook County, ss:*

I, John A. Rice, being duly sworn, depose and say that I am one of the proprietors of the Sherman House, a public house, situated on the corner of Randolph & Clark sts., in the city of Chicago, Ills., and was one of the proprietors on the 24th day of September, 1866; that on said 24th day of September a gentleman put up at said Sherman House who registered his name "E. Tisdale, Dubuque, Iowa," and he was assigned to room No. 218. So far as I can ascertain, and to the best of my knowledge and belief, said E. Tisdale was not seen in said Sherman House after Tuesday, the 25th of Sept., 1866. That on or about Friday, the 28th of September, there was found in said room 218 a small carpet-sack, which was believed to belong to said E. Tisdale, and which, on or about the 4th day of October, 1866, was given to J. S. Dennis,
58 esq., & one T. Palmer Rood, (the former of this city and the latter of Dubuque, Iowa.) And I further say that the bill of E. Tisdale was left unpaid until the same was paid by said Rood, on or about said October 4th. That I have not seen or heard of said Tisdale since said Sept. 25th, 1866.

JOHN A. RICE.

Witness my hand and notarial seal.
Subscribed & sworn before me this 15th day of February, 1867.
[NOTARIAL SEAL.] W. F. WENTWORTH,
Notary Public.

59 STATE OF IOWA, *Dubuque County, ss:*

I, S. M. Case, being duly sworn, depose and say, that I reside in Dubuque, Iowa; that on the 24th day of September, 1866, I was in the city of Chicago, Illinois, & that I was then and for many years had been acquainted with Edgar Tisdale, esq., of Dubuque, Dubuque County, Iowa; that on said 24th day of September I met said Tisdale at the Sherman House, corner of Randolph & Clarke streets, in said Chicago, and had conversation with him, during which he arranged with me to

leave Chicago on Tuesday evening, the 20th of Sept., for Dubuque aforesaid, and occupy a birth in a sleeping-car with me. I saw said Tisdale on said Tuesday at the Briggs House, in said Chicago, dining with one J. S. Dennis, esq., of said city, but had no conversation with him. I did not see said Tisdale again on that day and have not seen him
60 since. And I further say that said Edgar Tisdale was a man of correct and exemplary habits and had an estimable and good reputation.

S. M. CASE.

Subscribed and sworn to by S. M. Case, before me, this 15 day of November, 1866. Witness my hand & notarial seal.

[L. S.] T. PALMER ROOD,
Notary Public.

STATE OF IOWA, *Dubuque County, ss:*

I, Hattie B. Tisdale, being duly sworn, depose and say, that I am the widow of Edgar Tisdale, late of Dubuque, Dubuque County, Iowa, deceased; that on or about the 9th day of October, 1866, one T. Palmer Rood, of said county, delivered to me a small satchel, containing one revolver, shirts, papers, books, collars, &c., all which belonged to my husband Edgar, and which said Rood, as I verily believe, brought
61 from Chicago, Illinois, where he had been at my request in search of my said husband; that my said husband wrote me within a week prior to the 25th of September, 1866, that he would arrive in said Dubuque and meet me on the 26th of said September; that my said husband and myself were during the entire period of our marriage, to wit, nearly three years, on terms of the best and happiest agreement, understanding, & confidence, & nothing had ever occurred to alienate or disturb our conjugal attachment & affections; that I confidently expected his return to Dubuque on said 26th of Sept., & verily believe his failure was because he had been killed in said Chicago, where he had gone to attend to some of his mercantile business. And I further say that I have neither seen or heard of nor from my said husband since said Sept. 25th, and fully believe that he is dead.

HATTIE B. TISDALE.

Subscribed & sworn to before me, by Hattie B. Tisdale, this March 26th, 1867. Witness my hand & notarial seal.

[L. S.] T. PALMER ROOD,
Notary Public.

[Stamp, 5c.]

62 STATE OF IOWA, *Dubuque County, ss:*

I, Stephen Hempstead, sole judge and ex-officio clerk of the county court in and for said county, do hereby certify the foregoing to be a true and correct copy of the affidavits of T. Palmer Rood, Louise A. Muller, J. S. Dennis, S. M. Case, and John A. Rice, which affidavits are on file in the county court of said county, and are of the records o said court.

In testimony whereof I have hereunto affixed the seal of the county court, at office in the city of Dubuque, on this 27th day of March, A. D.

[L. S.] S. HEMPSTEAD,
County Judge and ex-officio Clerk.

5 c. U. S. stamp.

63 Plaintiff offered said papers in evidence for the purpose of showing that she had complied with the conditions of said policy of insurance as to service of notice and proofs of death of Edgar Tisdale, and to this evidence defendant objected as being irrelevant and immaterial, but the court overruled the objection, & said papers were admitted and read in evidence for the purpose for which they were offered by the plaintiff and not otherwise; to which ruling of the court defendant then excepted.

The foregoing was all the evidence as to service of due notice and proof of death as alleged.

2. Plaintiff then offered in evidence letters of administration issued to her upon the estate of said Edgar Tisdale upon the 18th day
64 of December, A. D. 1866, by the county court of Dubuque County, Iowa, to which defendant objected as irrelevant and immaterial, but the court overruled the objection and allowed the said letters to be read in evidence; to which defendant then excepted.

Plaintiff then introduced evidence tending to show that said Edgar Tisdale had not been heard from by his family or friends since September 25, A. D. 1866, and that diligent search had been made for him, and that she had offered and published a reward of $1,000 for him dead or alive, and had employed public and private detectives to find him, and that no traces of him have been found, dead or alive; and that he has not been seen or heard of since said Sept. 25, A. D. 1866.

Plaintiff then rested.

65 The defendant then introduced evidence tending to show that Edgar Tisdale was seen, in good health, on the corner of Clark and Lake streets in the city of Chicago, on the 25th day of September, 1865, at three o'clock in the afternoon, and that on the 22nd day of September, 1866, he had sold and transferred his store & stock of goods therein, & was at the time he disappeared on his way from Owatonna, Minnesota, as he represented, to Dubuque, Iowa, by way of Chicago; and that his wife, the plaintiff, had preceeded him to Dubuque, Iowa, on a visit to her parents, and that he then had no definite plans for future business or residence; and that he had no child and never had.

Defendant then rested.

Plaintiff then introduced evidence tending to show that the re-
66 lations between Edgar Tisdale and his wife, the plaintiff, were harmonious & happy, and that he was a man of good habits, character, and reputation, and that he was not indebted to any one; and that on the 24th day of September, 1866, he went to Chicago on business, expressing an intention to return to Dubuque, Iowa, in two or three days thereafter, to his wife, family, and friends.

Plaintiff then rested.

The court then charged the jury as follows:

Charge to the jury.

GENTLEMEN OF THE JURY: This is an action upon a policy of insurance issued by the defendant to the plaintiff. It is admitted that this policy was issued by the defendant, and the policy itself is before the jury in evidence, but the defendant contends that the plff.
67 cannot recover because the proofs of loss were not sufficient. It was necessary by the terms of the policy that the plaintiff, in order to be entitled to the money, should make certain proofs of loss; that is, proofs of the death of the insured.

If you find from the evidence that these so-called formal proofs were

made, and no objection was made to them by the defendant, you will treat as waived the objection as to their insufficiency.

In other words, it was the duty of the defendant, if they considered the formal proofs insufficient, to notify the plaintiff of that fact and require further proof; and if they put their objections to paying the money upon other grounds, they cannot now take advantage of the insufficiency of the proofs.

This is a civil action. It is not a criminal prosecution, and the jury are under the necessity of determining the case by a preponder-
68 ance of evidence. Conclusive evidence of the facts in this case is not to be expected.

There is a certain conclusive force of evidence necessary in a criminal prosecution, but this being a civil action for the recovery of money the rule of law is that the jury must determine it by the preponderance of evidence.

The burden was originally upon the plaintiff to make out her case; but the jury will see as I proceed that the burden was in the progress of the trial shifted to the defendant.

The real question in this case is whether the insured, Edgar Tisdale, was dead at the time of the issuing of the letters of administration; that is the real question the jury are called upon to decide. It was incumbent upon the plaintiff to prove that fact. The plaintiff has shown to the jury, as evidence of that fact, letters of administration
69 issued by the probate judge to her as administratrix. This the defendants object to as inadmissable. It is the duty of the court to instruct the jury that the evidence is sufficient to make a prima-facie case, and to change the burden from the plaintiff to the defendant.

I must explain in as few words as possible the meaning of the terms "prima-facie case." It is a case made by evidence that entitles the plaintiff to recover in the absence of countervailing evidence. If there is no evidence to overcome the case thus made the plaintiff is entitled to a verdict.

A prima-facie case may be of greater or less strength.

A prima-facie case, though not conclusive, is sometimes so strong that it requires evidence of great force to overcome it.

The case made by the letters of administration, although
70 sufficient unless overturned, is still not a strong case. This prima-facie evidence is but slight, and of course it would not require very conclusive evidence to overcome it. The reason is very obvious. This defendant was not before the probate judge. It was an ex-parte proceeding. The letters of administration were issued perhaps upon very slight proof.

The probate judge, however, did find from the proof before him that the party was dead, in order to issue the letters of administration. These without any contradictory evidence, give the plaintiff the right to recover.

But I must say that it does not require very strong evidence to overcome the prima-facie case thus made.

The court is request' to instruct the jury in regard to the absence of motive on the part of Tisdale to abscond, supposing you should adopt the defendant's theory of the case; looking at it from his stand-
71 point, to wit, that Tisdale was not dead at the time letters of administration were issued, but that he had absconded.

In the absence of any motive on his part to abscond, it will not be presumed that he did abscond; but if from the evidence the jury find

the fact to be that he did abscond, then the want of motive would have nothing to do with the case.

If the jury find that he did abscond, then it would follow that some motive existed.

The absence of motive to abscond is a material fact to be considered in a doubtful case.

If the principal fact be proved; that is, if this party was seen at Baxter Springs some time subsequent to the appointment of an administrator, and this fact is shown as proof of his having absconded,
72 then the fact of a want of motive to abscond is unimportant, because we cannot always look into the human heart and discover its motives. Crimes are frequently committed of a very grave nature, and yet we can discover no motive.

In general, motives must be inferred from facts, rather than facts inferred from motives. If it is established by proof that an act has been done, we know there has been some motive for it, though we cannot always see what that motive was.

If there is a total absence of motive, that is to be taken into consideration, in a doubtful case, in forming a conclusion as to the fact itself. For instance, if it were proved that one man had killed another, and it appeared as if he had no motive to kill; that the party killed was
73 his friend, at least not his enemy; that he stood in kindly relations toward the deceased; though the fact of a want of motive would have weight in a doubtful case, yet in the case thus supposed it would avail nothing.

I am also requested to instruct the jury as to the question of identification—whether the jury can rely upon the identification of a party by others. This scarcely admits of legal definition. The truth is that we do ordinarily rely upon our recollection of other men. If a man should say to you that he saw an individual of your acquaintance at a distant place you would believe him, in the absence of proof to the contrary. If at any time you have met a man of your acquaintance, and subsequently a controversy arises which calls into question this fact, you at once recall the circumstance of your meeting him, and you put confidence in your recollection of his person. Nevertheless, expe-
74 rience shows that we often make mistakes in this way, and so many cases of mistaken identity occur that it is our duty to receive such evidence with careful scrutiny when there is a case of doubt. When there is evidence to show error, then the jury must receive and consider evidence of personal identity which is inconsistent with other evidence in the case with scrupulous care and caution.

That is all, gentlemen, that the court can say upon this question of identity.

It does not admit of anything like a precise legal definition, in my opinion.

I am requested by the defendant to give to the jury some instructions in writing, which I will do. They are as follows:

1. The plaintiff must prove affirmatively the death of Tisdale, whether the defendants objected to the sufficiency of the preliminary proofs of loss or not.

75 2. If the jury are not otherwise satisfied from the evidence in the cause of the death of Tisdale, they cannot infer his death from the fact that he disappeared, and that no motive for his voluntary absence has been proved.

The above is given by the court with this explanation: that from the mere fact of the disappearance of Tisdale without apparent motive it

would not be safe to infer his death; and if this is all that the jury find to be proved in the case their verdict ought to be for the defendant. But it is the duty of the jury to consider all the circumstances attending the disappearance, and absence of Tisdale. Not only the mere fact of his disappearance, but the length of time during which he has been absent and not heard from; all the circumstances attending his disappear-
ance; the efforts, if the jury believe them to have been honestly
76 made, to find the insured and to ascertain his place of abode; the motives or want of motives as shown by the proofs to abandon his wife, family, and home; the state of his mind and affections with respect to his family and business—in a word, the jury must not fix their attention upon any one or more isolated facts or circumstances, but upon all the facts and circumstances disclosed by the evidence, and thus form their judgment of the probability of Tisdale's death.

Evidence has been given to the jury to show his relations to his family, the situation of his business, and the state of his mind; what he said in Chicago about his intention to return home, and what he said about his family. We know by experience that men gravitate strongly towards the home of their affections; it is their nature to do so
77 unless they are unhappy in their domestic relations. Of course, in determining this question the jury must take into consideration not only his absence but the length of time of his absence. If it were seven years, that would raise a presumption by law of his death; but if not absent seven years the presumption does not arise, although there is an absence of six and one-half years; and in this case it is necessary that the absence be corroborated, because there is no legal presumption of his death from mere lapse of time.

Your verdict will be, gentlemen:

"We, the jury, find for the defendant;" or,

"We, the jury, find for the plaintiff in the sum of dollars, with per cent. interest from the day of 1873."

78 If you find for the plaintiff, she will be entitled to recover the amount of the policy with interest running from ninety days from the time of the proof of loss.

I would say, in conclusion, that it is of the very greatest importance that you should find a verdict in this case. You will see yourselves that this is a ruinous litigation; the amount is not large, but the expenses are very heavy; therefore you must make an earnest effort in finding a verdict.

The defendant then excepted to so much of the charge as is in the following words:

"If, gentlemen, you find from the evidence that so-called formal proofs were made and no objection was made to them by the defendant, you will treat as waived the objection as to its insufficiency. In other words, it was the duty of the defendant, if they considered the
79 formal proofs insufficient, to notify the plaintiff of that fact and require further proof; and if they put their objections to paying the money upon other grounds, they cannot now take advantage of the insufficiency of the proofs."

The defendant also objected to so much of the charge as is in the following words:

"It is the duty of the court to instruct the jury that the evidence (letters of administration) is sufficient to make a prima-facie case and to change the burden of proof from the plaintiff to the defendant."

The defendant then asked the court to instruct the jury as follows:

"This suit being brought by the plaintff iin her own right and not in a

representative capacity, she must establish by competent testimony the death of Tisdale, independent of the letters of administration."

80 Which instruction the court refused to give; to which refusal defendant then excepted.

2. "When the issue in a suit brought upon a policy of life-insurance is the death of the insured, letters of administration granted upon the estate of the insured are not prima-facie evidence of his death where the suit is not brought by his administrator."

Which the court refused to give; to which refusal the defendant then excepted.

The jury having retired, returned with a verdict for plaintiff for amount of policy and interest.

The defendant asks that this bill of exceptions be allowed, signed, and sealed.

J. M. LOVE.

81 And on the same day the defendant filed in the clerk's office an assignment of error in words and figures following, to wit:

82 Circuit court of the United States, district of Iowa.

HATTIE B. TISDAL'
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE COMPANY.

Assignment of errors.

The defendant, the Mutual Benefit Life-Insurance Company, assigns the following errors:

1. The court erred in admitting in evidence the so-called preliminary proofs of death.

2. The court erred in admitting in evidence the letters of administration.

3. The court erred in charging the jury that if the defendant did not object to the preliminary proofs, but placed its refusal to pay on other grounds, the objection as to insufficiency would be considered as waived.

83 4. The court erred in charging the jury that the letters of administration were sufficient to make a prima-facie case for the plaintiff and change the burden of proof.

5. The court erred in refusing the 1st instruction asked by the defendant.

6. The court erred in refusing the 2nd instruction asked by the defendant.

Wherefore the said Mutual Benefit Life-Insurance Company prays that the judgment of the said circuit court may be reversed.

ADAMS & ROBINSON,
DE WITT C. CRAIN,
MUTUAL BENEFIT LIFE-INSURANCE COMPANY.

84 And on the same day said defendant filed in the clerk's office its writ of error, which said writ is in words and figures following, to wit:

85 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Iowa, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in said circuit court, before you, between Hattie B. Tisdale and the Mutual Benefit Life-Insurance Company, a manifest error hath happened, to the great damage of the said Mutual Benefit Life-Insurance Company, as by his complaint appears; and we, being willing that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and pro-
86 ceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Nathan Clifford, senior associate justice of the said Supreme Court of the United States, this, 23d day of May, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

[L. S.] GEORGE B. CORKHILL,
Clerk U. S. Circuit Court for the Dist. of Iowa.

87 And afterwards, to wit, on the 27th day of May, 1873, said defendant filed its bond for writ of error in said clerk's office, which said bond is in words and figures following, to wit:

88 Supreme Court of the United States.

HATTIE B. TISDALE
vs.
THE MUTUAL BENEFIT LIFE-INSURANCE COMPANY.

Know all men by these presents that we, the Mutual Benefit Life-Insurance Company of Newark, New Jersey, and John H. Lull and Frank M. Robinson, of Dubuque, Iowa, are held and firmly bound unto Hattie B. Tisdale, of Dubuque, Iowa, in the sum of six thousand dollars, to be paid to the said Hattie B. Tisdale, her executors, or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 23rd day of May, 1873.

Whereas the above-named Mutual Benefit Life-Insurance Com-
89 pany has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the United States circuit court for the district of Iowa:

Now, therefore, the condition of this obligation is such that if the above-named Mutual Benefit Life-Insurance Company shall prosecute its said writ of error to effect, and answer all costs and damages if he

shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MUTUAL BENEFIT L. INS. CO.,
By its Attys., ADAMS & ROBINSON.
JNO. H. LULL.
FRANK M. ROBINSON.

Approved:

JNO. F. DILLON,
Circuit Judge.

90 STATE OF IOWA, *Dubuque County, ss:*

I, John H. Lull, being duly sworn, on oath say that I have resided in the city of Dubuque, Iowa, about twenty-one years, and am worth the sum of twenty-five thousand dollars above all indebtedness and property exempt from execution.

JNO. H. LULL.

Subscribed & sworn to by John H. Lull, before me, this 24th day of May, 1873.

AUSTIN ADAMS.
Notary Public.

STATE OF IOWA,
Dubuque County, ss:

I, Frank M. Robinson, being duly sworn, on oath say that I have resided in the city of Dubuque, Iowa, about seventeen years, and am worth the sum of twenty-five thousand dollars above all indebt-
91 edness and property exempt from execution.

FRANK M. ROBINSON.

Subscribed & sworn to by Frank M. Robinson, before me, this 24th day of May, A. D. 1873.

[L. S.] MYRON H. BEACH,
Notary Public.

STATE OF IOWA, *Dubuque County, ss:*

I, P. J. Quigley, clerk of the district court of Dubuque Co., Iowa, do hereby certify that I am well acquainted with Dr. John H. Lull and Frank M. Robinson, and that they are each of them worth the sum of twenty-five thousand dollars above all indebtedness and property exempt from execution.

Witness my hand and seal of said district court, affixed this 24th day of May, A. D. 1873.

[L. S.] P. J. QUIGLEY, *Clerk.*

92 And on the 26th day of May, A. D. 1873, the following citation was filed together with the acceptance of service of the same.

UNITED STATES OF AMERICA, *ss:*

To Hattie B. Tisdale, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Iowa, wherein

The Mutual Benefit Life-Insurance Company is plaintiff, and Hattie B Tisdale is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable John F. Dillon, judge of the said circuit court *court* of the United States, this 23rd day of May, in the year of our Lord 1873.

JOHN F. DILLON,
Circuit Judge.

We hereby accept service of the above citation, and acknowledge receipt of copy of same, this 24th day of May, 1873.

CRANE & ROOD,
Attorneys for Hattie B. Tisdale.

93 STATE OF IOWA, *Dubuque County:*

I, Austin Adams, being duly sworn, on oath say that I served the within citation on the within-named Hattie B. Tisdale by reading the same to her attorneys, Crane & Rood, and by delivering to them a copy of the citation this 24 day of May, 1873, at the city of Dubuque, Iowa.

AUSTIN ADAMS.

Subscribed & sworn to by Austin Adams, before me, this 24th day of May, 1873.

[SEAL.] FRANK M. ROBINSON,
Notary Public of Iowa in & for Dubuque Co.

Filed May 26, 1373.

GEORGE B. CORKHILL, *Clerk.*

94 Circuit court United States, district of Iowa.

I, George B. Corkhill, clerk of said court for said district, do hereby certify that the above and foregoing transcript contains full, true, and complete copies of all process, pleadings, and proceedings, together with the original citation, in a certain cause wherein Hattie B. Tisdale is plaintiff, and The Mutual Benefit Life-Insurance Company defendant; said copies as full, true, and complete as the originals of the same now remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at my office in Des Monies, in said district, this 24th day of October, 1873.

[SEAL.] GEORGE B. CORKHILL,
Clerk U. S. C. C., Dist. of Iowa.

Fee for transcript, $25.00. Paid by Austin Adams, deft.'s atty.

GEORGE B. CORKHILL, *Clerk.*

(Indorsement on cover:) No. 319. The Mutual Benefit Life-Insurance Company, plaintiff in error, vs. Hattie B. Tisdale. Iowa C. C. U. S. Filed 5th November, 1873.

Supreme Court United States.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

HATTIE B. TISDALE.

No. 94.

BRIEF FOR PLAINTIFF IN ERROR.

FREDERICK T. FRELINGHUYSEN,
EDWIN L. STANTON,
Counsel for Plaintiff in Error.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, Plaintiff in Error,

v.

HATTIE B. TISDALE.

No. 94.

STATEMENT OF THE CASE.

This is an action brought by defendant in error (plaintiff below) on a policy of insurance for $2,000, issued on March 1, 1866, by the Mutual Benefit Life Insurance Company, plaintiff in error, (defendant below,) on the life of Edgar Tisdale, the sum insured being payable to the plaintiff below.

The petition of plaintiff below alleges that insured died on or before September 24th, 1866.

The plea mainly relied upon by the defendant below denies this allegation. Another plea denies that due notice and proof of death had been furnished to the company, as required by the contract of insurance, and as alleged in the petition. (Record, p. 3.)

The action was begun December 2d, 1867, and was first brought to trial in May, 1872, when the jury disagreed. The next trial occurred a year later. At the second trial the plaintiff below first introduced in evidence the notice and proofs of death furnished to the company, together with testimony tending to show that the company had made no objection to the papers, but had refused payment on the ground that the defendant did not believe the insured was dead. This evidence has reference, so

far as the plaintiff below is concerned, to the issue relating to the furnishing of the requisite notice and proof of death to the company. (Record, pp. 14, 15, 16, 17, 18.)

Upon the other and principal issue, as to whether the insured was dead, plaintiff below then offered in evidence letters of administration issued to her upon the estate of the insured on December 18th, 1866, by the county court of Dubuque, Iowa. This evidence was admitted against the objection of the defendant below, and an exception to the ruling of the court was taken. The plaintiff below then introduced evidence tending to show that the insured had not been heard from by family or friends since September 25th, 1866, notwithstanding diligent search had been made for him. The defendant below introduced evidence tending to show that the insured had no child, and no definite plans for future business or residence, but had sold his property, and was on his way from Owatonna, Minnesota, to Dubuque, Iowa, by way of Chicago, and that his wife, plaintiff below, had preceded him to Dubuque, on a visit to her friends; and that the insured was seen in Chicago on the afternoon of September 25th, 1866, the day after his supposed death. Documentary evidence introduced by plaintiff below shows that the insured had closed his business, had paid about $60 to the merchants to whom he was indebted, and had obtained from a bank about $2,000 in cash. (Record, p. 15.)

It appears that evidence was also adduced tending to show that the insured was seen at a place called Baxter's Springs after letters of administration were taken out. (Record p. 21.)

In rebuttal plaintiff below adduced evidence tending to show that the domestic relations of insured were harmonious; that he was a man of good habits, and that on September 24th, 1866, he went to Chicago on business, expressing an intention to return to Dubuque in two or three days.

The court instructed the jury that the real question in this case is, whether the "insured Edgar Tisdale was dead

at the time of the issuing of the letters of administration. * * * * * The plaintiff has shown to the jury as evidence of that fact, letters of administration issued by the probate judge to her as administratrix, * * * * It is the duty of the court to instruct the jury that this evidence is sufficient to make a *prima facie* case, and to change the burden from the plaintiff to the defendant, * * * * * The letters of administration were issued perhaps upon very slight proof. The probate judge did find, however, upon the proof before him, that the party was dead, in order to issue the letters of administration. These, without any contradictory evidence, give the plaintiff the right to recover." (Record, p. 20.)

The defendant below asked the court to instruct the jury that "this suit being brought in her own right and not in a representative capacity, she must establish by competent testimony the death of Tisdale independently of the letters of administration." And also, that "when the issue in a suit brought upon a policy of life insurance is the death of insured, letters of administration granted upon the estate of the insured, are not *prima facie* evidence of his death, where the suit is not brought by his administrator." (Record, p. 23.)

To the refusal of the court to grant either of these instructions, exceptions were taken. The defendant below also excepted to the instruction to the jury that "the evidence (the letters of administration) is sufficient to make a *prima facie* case, and to change the burden of proof from the plaintiff to the defendant."

Assignment of Errors.

The errors relied upon by the plaintiff in error are:

1. The ruling which admitted letters of administration issued upon the insured's estate as evidence of the death of the insured, in an action in which his personal representative is not a party upon the insured's estate, and in which

the legal presumption at the trial was that the insured was still alive.

2. The instruction of the court to the jury in such an action that "the evidence (the letters of administration) is sufficient to make a *prima facie* case, and to change the burden of proof from the plaintiff to defendant."

3. The refusal of the court in such a case to instruct the jury that "in an action brought by the plaintiff in her own right on a contract between herself and the defendant below, and not in a representative capacity, she must establish by competent testimony the death of the insured independently of the letters of administration."

4. The refusal of the court in such an action to instruct the jury that "when the issue in a suit brought upon a policy of life insurance is the death of insured, letters of administration granted upon the estate of the insured are not *prima facie* evidence of his death, where the suit is not brought by his administrator."

Argument.

It will be seen that the real question in this case is whether, in an action brought by a plaintiff in his own right upon a contract between himself and the defendant, in which the issue is whether a person who has not been absent seven years is dead or alive, and the legal presumption is that he is alive, letters of administration issued upon his estate by a probate court in an *ex parte* proceeding, and "upon very slight proof," are sufficient evidence of death, countervailing the presumption of life, shifting the burden of proof, and, in the absence of contradictory evidence, establishing the death. As this action was brought by the plaintiff in her own right, and is based upon a contract with herself, it matters not, as respects the admissibility and effect of the letters of administration, whether they were granted to herself or to some third person not a party to the action.

I. It is believed that, upon a review of adjudicated cases

and the opinions of text writers, the ruling of the court below will be found to be opposed to the weight of authority upon this question.

In French *v.* French, 1 Dickens, 268, decided in 1755, a bill was brought by the heir-at-law of his brother, who, in 1740, went to the East Indies and was drowned, to be let into possession of his estate, sold after his death. Defendants in possession disputing the death, and plaintiff having no positive proof of his brother's death, a doubt arose at the hearing, upon the probate of his will being offered to be read, whether it could be admitted as evidence of the fact. Lord Hardwicke said that while the act of the prerogative court certainly could not be admitted as original evidence of a fact before him, still, in the case before him, he would, "under all the circumstances, admit the probate as proof of death." The circumstances inducing him to do so were that probate had been granted so long before that it would be difficult, at such a distance of time, considering the place of death, to get more positive proof, and that the executor, who would be entitled to the rent accrued before the death as the personal representative, admitted the death. The decision recognizes the rule in general to be different.

It must also be remembered that the inaccuracy of Dickens' Reports has been frequently commented upon in the English courts. The author was register for the court of chancery, and the reports were prepared after his death by Mr. Wyatt; "and these, being rather loose, were not considered as of very high authority. He was constantly applied to to know if he had anything on such and such subjects in his notes; but if he had, the register's books were always referred to." (Lord Redesdale, in 1 Sch. & Lef., 240; see also 3 My. & Cr., 419–421; 2 Phillips, 240; and Wallace on Reporters, 293.) It is possible, therefore, that some of the circumstances which caused the admission of the letters of administration in the case above cited may not appear in the report. The case, however, is import-

ant as showing that in general letters of administration are not *prima facie* evidence of death.

In Lloyd, executrix, *v.* Finlayson, 2 Espinasse, 564, "Lord Kenyon ruled that, as the only plea in the record was on the merits which were thereby put only in issue, the defendant had admitted the plaintiff's right to sue, so that the production of the probate of the will was, under such circumstances, sufficient evidence as well of the death of the testator as of the plaintiff's right to support the action." Here the probate of the will was held to be admissible only because the action was brought by the executrix, and there was no plea of *ne unques* executrix. Otherwise the letters could not have been admitted in evidence.

In Thompson *v.* Donaldson, 3 Espinasse, 64, Lord Kenyon said he would expect further proof of the person's death than merely letters of administration. Defendant having no other evidence, plaintiff had a verdict.

In Moons *v.* De Bernales, 1 Russell, 307, the master of the rolls (Lord Giffard) held that letters of administration were not *prima facie* evidence of death.

In Clayton *v.* Gresham, 10 Vesey, 288, Lord Eldon said: "Where money is ordered to be paid to A or his representatives, the constant course upon payment to creditors, upon an application to the court itself by petition the death must be proved; and the production of the probate will not do."

In Leach *v.* Leach, 8 Jurist., 211, a petition was presented, one object of which was to obtain the payment out of court of a certain sum of money, to which a party had, by the decree in the cause, been declared to be absolutely entitled. It was alleged that the party had died intestate, and letters of administration and the registry of the death of the individual were submitted. The vice chancellor, Sir Knight Bruce, was not satisfied with this, and inquired whether the other branches of the court acted on such evidence.

Elderton, as *amicus curiæ*, stated that the master of the rolls declined to receive such evidence as proof of death.

Knight Bruce, V. C.—I am not surprised to hear that such

is the case, and am of opinion that in this case there must be an affidavit of the death, upon the production of which the order might be taken.

Newman, administrator, *v.* Jenkins, 10 Pick., 515, was an action brought by an administrator, and, as in the case of Lloyd, executrix, *v.* Finlayson, 2 Espinasse, there was only a plea to the merits. In such a case, therefore, it was held that the letters of administration were conclusive. The reasoning sustaining such a decision is stated by Lord Kenyon in Lloyd, executrix, *v.* Finlayson.

Ketland *v.* Administrator of Lebering, 2 Wash. C. C., 201; Cunningham *v.* Smith, Administrator, 70 Penn. St., 450; Belden *v.* Administrator, 47 New York, 308, were similar cases. The actions were brought by administrators, and the pleadings did not put in issue the plaintiff's right to sue in that capacity.

French *v.* Frazer, administrator, 7 J. J. Marsh., 431, was an action revived in the name of the administrator, and the letters of administration were held, in the absence of rebutting evidence, to show the right of the plaintiff to sue in that capacity.

In Jeffers *v.* Radcliffe, 10 N. H., 245, it was held that the grant of letters of administration on the estate of an individual is *prima facie* evidence of death; but the court admitted that the English law is different. The reasons for the decision of the court are thus stated: "The situation of our probate court is different. In all cases involving questions of fact there is a right of appeal directly to this court, and any issue arising is subject to trial by jury. In this respect the probate court is but a subordinate branch of this court; and where their proceedings are thus subject to revision and correction here, the court would seem bound to regard them at least as *prima facie* evidence of any facts necessarily resulting from their proceedings." The question there was determined by the peculiar organization of the courts in that State.

In Tisdale *v.* Connecticut Mutual Life Insurance Company, 26 Iowa, 177, it was held that letters of admin-

istration are *prima facie* evidence of death. But no reasoning in support of this proposition is given, and it is stated solely on the authority of Greenleaf on Evidence. Reference will hereafter be made to the insufficient basis, so far as cases like the one at the bar are concerned, for the statement there made.

This case was again before the same court, and is reported in 28 Iowa, 12; but the question of the effect of letters of administration as evidence was on the second occasion only incidentally mentioned.

The case of Munroe *v.* Merchant, 26 Barbour, 383, was an action of ejectment tried in 1856. Plaintiff claiming to derive title from one R. Van Dam, offered in evidence an exemplified copy of the will of the latter, bearing date June 16th, 1746, by which I. Van Dam, R. Livingstone, and T. Moone, were appointed executors, with power to sell real estate; and exemplified copies of the wills of I. Van Dam and T. Moone, and letters of administration granted thereon—the former in 1750 and the latter in 1756—and an exemplified copy of a deed from R. Livingstone, as surviving executor of R. Van Dam, dated October 24, 1770. The principle upon which in this case exemplified copies of these ancient wills and records were admitted as *prima facie* evidence of the death of I. Van Dam and T. Moone, is not stated in the report of the case; but Russell *v.* Schuyler, 22 Wendell, 237, is cited, in which it was held that, for the purpose of raising a presumption or proving a pedigree, in an action for the recovery of lands by recitals contained in an ancient instrument, the probate of a will, as a will of personal estate, or the record thereof in the proper office, is admissible. The question presented and decided in Munroe *v.* Merchant is, whether the recital contained in the probate of a will, and letters of administration more than a hundred years old, were admissible in evidence for the purpose of raising a presumption of death before the date of the instrument. That is a different case from one in which, at the time of trial, the legal presumption is that a person is still alive, but in which

it is sought, by merely introducing in evidence letters of administration of very recent date, to change the burden of proof and make a *prima facie* case of death of the person, without any other testimony in support of that issue. With reference to both cases above cited of Munroe *v.* Merchant, 26 Barbour, 383, and Belden *v.* Administrator *et al.*, 47 New York, 308, it is also to be noted that there is in New York a statute alluded to in Russell *v.* Schuyler, 22 Wendell, 337, (cited in Munroe *v.* Merchant,) and in Sibley *v.* Waffle, 16 N. Y., 184, to the effect that letters testamentary and of administration granted by an officer having jurisdiction, shall be conclusive evidence of the authority of the person to whom the same may be granted, until the same shall be reversed, or appealed, or revoked.

That letters of administration are not evidence of the death of the party is laid down in 2 Starkie on Evidence, 365, (title, Death;) 1 Phillips on Evidence, 343; Tamlyn on Evidence, 154, (41st vol. Law Library;) and in Hubback on Evidence of Succession to Real and Personal Property, 162, (37th vol. Law Library.) A citation from the last-named authority illustrates the views expressed by the authors of the other treatises. "Letters of administration are not, in the temporal courts, even *prima facie* evidence of death. The same remark applies to probate of a will, for the death is not the matter directly determined by the ecclesiastical court, but only inferable by argument from the grant of administration or probate, which is not therefore evidence of the fact in other courts." 1 Salk., 290. And a foot note states "that in Scotland it has been repeatedly held that confirmation and decree dative as executor, since they pass of course, do not overcome the legal presumption of life. Morrison on Presumption, XVI." Only in 1 Greenleaf, section 550, is the statement made that the grant of letters of administration is in general *prima facie* evidence of the intestate's death. The authorities cited in the earlier edition of the work in support of this proposition are Thompson *v.* Donaldson 3 Espinasse, 64; French *v.* French, 1

Dickens, 268. As already stated, in the former of these cases Lord Kenyon held that letters of administration were alone insufficient; and in French *v.* French, Lord Hardwicke doubtingly admitted them under certain special circumstances of the case before him, which may or may not be accurately stated in the report. These authorities are against, and not in favor of, the proposition stated by Greenleaf. It is believed that the sentence quoted from that author is the first enunciation of the broad proposition there stated.

In the treatises of other authors, as well as in reported cases, a different rule has been uniformly laid down. The later editions of Greenleaf on Evidence refer to Hamblin's case, 3 Rob. La. Rep., 130, and Jeffers *v.* Radcliffe, 10 N. H., 245, above cited. In the Louisiana case the question of death was not raised, and it is not an authority in point, and the New Hampshire case turns on the statutory organization of the courts of that State. It is not suggested by Greenleaf that, on principle, a rule should prevail in this country different from the one which has uniformly been recognized in England. That author, by his references, concedes that the English precedents should govern. And to the identity in respect of general nature and jurisdiction between the courts of probate jurisdiction of this country, and the ecclesiastical courts of England, this court, in Ferris *v.* Higley, 20 Wallace, 382, refers in such manner as, by implication, to preclude the existence of a difference between the rule which ought to prevail in the courts of England and the rule which ought to obtain here, concerning the admissibility and effect of letters of administration as evidence in courts of general jurisdiction. But, so far as concerns cases like the one at bar, besides being without foundation upon earlier cases and treatises, the dictum in Greenleaf has only been followed as authority in Tisdale *v.* Insurance Co., 26 Iowa. The weight of authority is the other way.

II. Upon principle and analogy, as well as according to

adjudicated cases and the views of text writers, it would seem that it should be held that letters of administration are not, in such cases as the one at bar, admissible as proof of death. It can hardly be contended that they are admissible for such a purpose upon any other ground than by reason of being a judicial act, as being in the nature of a decree *in rem*, and as proving the facts, upon the supposed existence of which the judgment is founded. But the judgment of a court of concurrent or exclusive jurisdiction is not evidence of any matter which comes collaterally in question, though within its jurisdiction, nor of any matter to be inferred by argument from the judgment. (De Grey, C. J., in givng judgment in The Duchess of Kingston's Case, 11th St. Tr., 261; 1 Starkie on Evidence, 257.)

The sentence of an ecclesiastical court is not evidence of any collateral matter which may possibly be collected or inferred from the sentence by argument. (Blackham's Case, 1 Salk, 290; 1 Phillips on Evidence.)

A judgment, decree, or verdict is allowed to operate as evidence against those who were strangers to the original suit, who were not parties to that suit, and do not claim in privity with a party, only when the proceeding is *in rem;* where the court exercises peculiar jurisdiction, which enables it to pronounce on the nature and qualities of particular subject matter of a public nature and interest independently of any private party. (1 Starkie on Evidence, 285.)

Generally, it is only as judgments *in rem* that any proceedings of ecclesiastical courts, or, in this country, probate courts, are ever admissible. But where a judgment is admissible, evidence against one who is neither a party nor privy to it, being a direct, final, and conclusive determination of a court of competent jurisdiction upon the particular subject matter, the judgment is not merely *prima facie*, but conclusive in any other proceeding, unless it can be impeached on the ground of fraud or collusion. The rule is that the record of a judgment *in rem* is either conclusive or wholly inoperative. (1 Starkie on Evidence, 296.) Thus, the

grant of a probate is conclusive evidence against all, as to the title to the personalty of a decedent, and of all rights incident to the character of an executor or administrator. The learned author of the treatise on Evidence of Succession to Real and Personal Property, above cited, well states that the death is not the matter directly and therefore conclusively determined on by the ecclesiastical court, but it is only an inference by argument from the grant of administration or probate.

III. The court below instructed the jury that in this action, in which the personal representative of Tisdale is not a party, and in which the legal presumption at the trial was that Tisdale was still alive, letters of administration, without any other testimony, were sufficient to make a *prima facie* case and change the burden of proof, so as to require the defendant (the plaintiff in error here) to prove that Tisdale was alive. If, as above maintained, this rule is opposed alike to the decisions of courts and the opinions of text writers, and is on principle erroneous, the injury to the defendant is manifest, and the judgment below should be reversed.

FREDERICK T. FRELINGHUYSEN,
EDWIN L. STANTON,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

IN ERROR.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY,

vs.

HATTIE B. TISDALE.

Argument of F. T. Frelinghuysen.

HOLBROOK, Printer, 11 Mechanic-st., Newark, N. J.

Supreme Court of the United States.

The Mutual Benefit Life Insurance Company, Plaintiffs in Error, and Hattie B. Tisdale, Defendant in Error. } *In Error to the Circuit Court of the U. S. for the Dist. of Iowa.*

BRIEF.

March 1, 1866, the defendant in error insured her husband Edgar Tisdale's life with the plaintiff in error for $2000, which sum was by the policy payable within 90 days after the notice and proof of his death. The notice and proof of death relied on were given the Company prior to April 1, 1867. The suit was commenced October 2, 1867. The notice and proof show the following alleged facts, which it may become important to observe.

The plaintiff below was married to Edgar Tisdale, October, 1863, and lived with her husband at her father's house in Dubuque, Iowa, until May, 1866. Then he removed with his wife to Owatama, Minnesota, and engaged in the mercantile business. Prior to their removal and March 1, 1866, Hattie B. Tisdale took out from the plaintiff in error, a policy on the life of her husband, and also a policy on his life from the Connecticut Life Insurance Company. The wife in September, 1866, visited her father at Dubuque. On the 20th of September, 1866, Edgar Tisdale sold out his stock in ~~Owatama~~, said he was going to Chicago to settle some business, by the 26th of September he would go to Dubuque to see his friends, and would be back to ~~Owatama~~ by the 2d of October. He slept at the Sherman House in Chicago, paid his debt in that city amounting to $60, dined with a friend at Briggs' House on the 25th of September—said he was going that night or the next to Dubuque—a week later his satchel with some clothing and a navy revolver was found in the room at the Sherman House, and his bill at the hotel was unpaid.

Owatamma
Owattamma

I. An exception was taken to the Court's ruling, that the notice and proof of death required by the policy as a condition precedent to suit and recovery were sufficient.

It is clear that the proofs do not show that Edgar Tisdale died by suicide, or by murder, or by accident, or by disease. There is no proof that he died at all. The proof is that he is absent under circumstances which lead Hattie B. Tisdale to think he must be dead. The fact that he is absent just after his wife has gone back to her father's in Dubuque, and just after Edgar Tisdale had converted his mercantile enterprise commenced at Owatama four months before into cash, might lead others to think that he was only absent, and not dead.

But we understand that the plaintiff below was only required as a condition precedent to her suit to give the Company such proof of Edgar Tisdale's death as she possessed, and if she did that she then had a right to sue.

The Judge holds the preliminary proof sufficient, because the Company did not object to them. It would seem that the proof was sufficient if the Company had objected, provided always that was all the proof she had, and was the proof upon which she relied for a recovery. The preliminary proofs in fact performed their office, they enabled the Company to decide whether they would pay, and they decided they would not, and the preliminary proofs informed the Company what case they must defend, and that case they did meet. If Hattie B. Tisdale had other proof which she withheld, she and not the Company must meet the consequences of her so doing. We do not insist that this exception is well taken.

II. The other exception is that the Court permitted the plaintiff below to give in evidence letters of administration taken out in the County Court of Dubuque County, Iowa, on the 18th of December, 1866, by the plaintiff below on the estate of Edgar Tisdale.

a. The suit was properly brought by the plaintiff below in her individual capacity, the contract was with her, the money was due her if due anyone. She would have had no standing in Court as the representative of Edgar Tisdale. The letters of administration were not introduced to show that she was the administratrix. That fact was in no manner involved in the case. They are introduced only to prove Edgar Tisdale's death.

b. The Judge says in his charge: "The burden was originally on the plaintiff to make out her case; but the jury will see as I proceed that the burden was in the progress of the trial shifted to the defendant. The plaintiff has shown to the jury as evidence of that fact letters of administration issued by the probate judge to her as administratrix. This the defendant objects to as inadmissible. It is the duty of the Court to instruct the jury that the evidence is sufficient to make *a prima facie case, and to change the burden from the plaintiff to the defendant.*"

The Judge doubting, we think, his conclusion proceeds to state how weak a prima facie case is thus made, and how easily it could be overthrown. If in this the Court had been correct, yet in a case where neither party either knew or were able to show whether Edgar Tisdale was dead or alive, the party that had the presumption in its favor *must* succeed, and the party that had the burden of proof must fail. But we submit the Court was not correct. If the testimony was competent, it was conclusive. When a judicial record binds a party it binds him conclusively, and the relief is to show that it is not a judgment, by showing that the Court had not jurisdiction. It is true that in the case of administration a want of jurisdiction is shown by proving the alleged intestate in life; but until that is established the judicial record is between those who are bound by it conclusive evidence of the death, and is not weak prima facie evidence.

c. Letters of administration are not competent on the issue of life or death, because so to hold would be to violate these established principles of law, viz.:

"A transaction between two parties ought not to operate to the disadvantage of a third." "Res inter alios acta alteri nocere non debet."

"It is a most obvious principle of justice that no man ought to be bound by proceedings to which he is a stranger."

It is clear that even admitting letters of administration to be given in evidence in a suit to enforce a claim of the intestate is an exception to these rules, but an exception which rather strengthens than weakens them, because the exception results from sheer necessity. A man dies in full business; his affairs are interwoven with society. The claims of the living demand that he be represented, and it would be impossible to stop at every turn and have an adju-

dication of death and intestacy, with an appointment of a representative. Ex necessitate rei the administrator must be recognized.

But there is no necessity that these rules of the Common Law should be violated or modified when the representation of the decedent is not involved, when he has no personal relations to the transaction.

There is no more reason why these "res inter alios acta," why these judicial records to which this Company are strangers should be evidence by which their money should be taken than that a judgment between any other strangers should constitute a money demand against this Company.

An effort is made to take the granting of letters of administration out of these rules of the Common Law by claiming that the proceeding in the Probate Court is in the nature of a proceeding in rem; and that while before the adjudication for administration the presumption of life attached to Edgar Tisdale, after it, he was to society presumptively dead. Test this theory: Should a chain of circumstances now discover themselves pointing to parties in Chicago as being guilty of the murder of Tisdale, and the only fact wanted for the conviction was the proof that Tisdale was dead, could this proceeding in rem be resorted to to prove the fact? If the proceeding has legitimately the effect claimed for it it certainly could be. If it be said a different kind of evidence be required in a criminal from a civil case, we must deny it; the kind of evidence is the same. Greater conclusiveness may be required in the former than in the latter, but here the adjudication if it is in rem is perfectly conclusive until you show a want of jurisdiction. No Court would hold such evidence at all competent.

Again—if the letters are as between strangers proof of death they are as between strangers proof of intestacy. It would be tedious to enumerate the many uses that such proof might be put to and the peril that would result therefrom. The "rem" theory is unsound.

Letters of administration are admitted as against strangers because of the necessity of representation, and where that necessity ceases there competency ceases.

The law is that the presumption of life continues for seven years, and *not* that it continues for seven years *unless* some one in one of the 2,300 counties of the United States takes out letters of administration on the estate of the individual whose life is in issue.

The brief of the defendant in error refers us to nine case and to Greenleaf to sustain the position that letters of administration are competent evidence to prove the death of the intestate in an issue between strangers, and when the letters are not used for the purpose of showing the authority of the administrator, for that is the only question here.

26 and 28 Iowa, Tisdale v. Life Ins. Co., I shall not notice—they are virtually this case. This new insurance evidence seems there recently to have had its origin.

10 N. H., Jeffers v. Radcliff, was a partition case and one party made title under an administrator's deed. Court held that granting letters of administration was evidence of the death of the person whose estate was administered. The question of representation was directly involved—and that the letters in such case are evidence of the death we are not now denying.

10 Pick. 516, Newman, Admr. v. Jenkins, was a suit by an administrator on a note, to which there was no plea in abatement. It was contended that as seven years had not elapsed since the alleged death, the presumption was that the intestate was in life.

The Court said that death was established by the adjudication of the Probate Court. We are not denying it.

2 Wash. C. C., 201, Ketland v. Administrator of *Lebering*—a person called Lebring was on the ship's rolls and no person called *Lebering*. The Court gave the wages to the administrator of Lebering, and remarked that letters of administration having been granted by a Court of proper authority, the Court will take the person to be dead who is represented by the administrator. This is the every day case of treating letters of administration as good for the purpose of representation.

70 Penn. St., 450, Cunningham v. Smith, Admr. Jerome Smith was in the business with Cunningham & Sons, and took out a policy on his life, assigned it to Cunningham & Sons, and *they* collected it. Smith's administratrix Anne Smith sued Cunningham & Sons for the money, alleging that the assignment was only as collateral, and that her husband was not indebted to Cunningham & Sons.

It is the ordinary case of a suit by a representative, and the letters are evidence of death.

26 Barb., 383, Monroe v. Merchant. Title was made under will of Rip Van Dam, which gave a power to sell to Isaac Van Dam, Thomas Moore and Robert Livingston, his executors or to the sur-

vivor. The deed was made by Robert Livingston, and to prove that he alone survived at the date, exemplified copies of the respective wills of Isaac Van Dam and of Thomas Moore, admitted to probate in 1750 and 1756, (while the cause was tried in 1858) were given in evidence. The Court supports its ruling by referring to Russel v. Schuyler, 22 Wend., 276, where it is held that for the purpose of raising a presumption or proving a pedigree, in an action for the recovery of lands by recitals contained in *ancient* instruments, the probate of a will was admissible. The wills were incidents to a title. They were terriers. They were a hundred years old, and as competent as tomb-stones. They were the best evidence of which the case, from its nature, was susceptible.

47 N. Y., 308, Belden, Admr. v. Meeker. The complaint sets out that the Plaintiff was the duly appointed administrator. The answer was a general denial. The Court held in that case that the letters of administration were sufficient prima facie evidence to establish the plaintiff's representative capacity.

7 J. J. Marsh. 431, French v. French, Adm'r. This is a suit by an administrator.

No one of the cases touches the question whether letters of administration, when not used to establish the right to represent the intestate, are evidence of death as between strangers.

The case of 3 Esp. R. 63, is directly in point.

Thompson sued Donaldson on a policy of insurance; the defense was that one Donoghoe, in whom the interest was averred to be, was dead at the time of effecting the policy, and letters of administration granted to a person as his administrator, were offered in evidence. Lord Kenyon said that whether Donoghoe were living or dead was a fact capable of other proof which the defendant should have prepared with; also, 11 State Trials, 261.

1 Phil. Evid., (4th Amer. Ed'n), 343, 344.

III. I submit further that if letters of administration be generally competent for the purposes claimed for them, in the case at bar letters are not so competent.

a. Where the Court are called upon to apply established law within its recognized limits it is not proper to consider its effects. These effects have been discounted by society; counsel have ad-

vised, contracts have been made, rights have been adjusted, and the effects of the law even if injurious, have been anticipated and avoided.

But when as here it is sought to give a novel and far-reaching application to a legal proposition which must be admitted to be at best of doubtful truth, the Court are bound to look at the question in the light of *public policy*. We do not claim that life insurance companies are entitled to any especial favor. They may effect much good, relieve from anxiety and avert want, they are, however, money enterprises, and not public charities; but the Court for the sake of society, will see that the law be so administered as not to make fraud profitable and crime easy.

Those of bad principles who brave anything to gratify their greed for gain, for small percentage can obtain a policy insuring the life of an accomplice, and if any letters of administration granted in any one of the more than 2300 counties of the United States on the ex parte affidavit of an associate is proof of the death of the insured, to be sprung without notice upon the Company at the trial, then they can always recover and crime is made easy, and fraud profitable. The Company cannot meet and bear the burden of proving the insured in life. The claimant knows all there is to be known of the life, habits and whereabouts of the insured—the Company know nothing. Had they notice of this ex parte record evidence which is to shift the burden of proof, they might scour the land, and the insured all the time be luxuriating in the claimant's garret.

Hitherto the required proof of the death has been an inconvenient check on these frauds. Those engaged in them have manufactured the circumstances of murder, substituted the corpse for the living, perpetrated arson, and have had the funeral service read over the coffin, found afterwards to contain only stones—but the burden of proof was upon them. The Companies have been able amid all their devices by the aid of presumption of life to unmask the villainy and protect their innocent constituency.

Take from Life Insurance Companies the presumption that the insured is in life, and cast upon them the burden of proof and the effect must be to make fraud profitable and crime easy.

b. The Life Insurance Companies are but trustees for those who are mutually insured. To protect this constituency from fraud, the

Company by their policy provide that they are only liable to pay 90 days after notice and proof of death is given them. This provision is to secure to the Company two benefits they are honestly entitled to—first, that they who have no information may learn from those best informed the circumstances of the death that they may be authorized to pay without the expense and vexation of suit; and secondly, that they may be able to prepare and defend themselves against false claims.

If the claimant presents the circumstances of the death honestly and the Company pay, there is the end of the matter—if the Company think it is a case in which they should not pay, the claimant having complied with the condition precedent of submitting his proof brings his suit. If the claimant discovers further proof he can use it on the trial, *provided* he gives the Company notice of it, *but not otherwise.*

In Campbell v. Charter Oak Insurance Co., 10 Allen, 213. Irwin v. The Excelsior Ins. Co., 1 Bosworth, 50, it is held that where a mistake has occurred in the preliminary proofs presented, and no corrected statement is furnished the insurance company before trial, the insured will not be allowed on the trial to show that the facts were different from those stated in the preliminary proofs.

This Court in Life Ins. Co. v. Newton, October term, 1874, said: Possibly the rule above stated "is properly applicable only where the insurers have been prejudiced in their defence by relying on the statements made in the proof."

No one will pretend that a simple affidavit in this form: "I, A B., being duly sworn, do say that C. D., the insured, is dead," would satisfy the requirements of the policy. Proof is that which tends to convince and satisfy. Proof consists not in the statement of a result, but in those circumstances which lead to the conclusion. The proof must show as well as is possible where, and when and how the insured died. If the insured died in the Tropics, or by his own hand, or after the expiration of the policy, then the Company is not liable; and while the claimant is not bound to make out the Company's defence, he is bound to tell all the facts, for the reasons we have stated.

A simple statement that the insured is dead would not satisfy the demand of the contract; and yet all that the letters of administration say is this, "Edgar Tisdale is dead." Simple serving as preliminary proof a copy of the letters would not be sufficient, and

there is surely no less proof required at the trial than that which is required as preliminary to the suit. And yet the Judge told the jury that that proof by the letters of administration *alone* established Edgar Tisdale dead, and cast on the Company the burden of proving him in life.

Let the law as to the effect of letters of administration be generally what it may, it is not under the contract in suit sufficient proof of the death.

c. Again, these letters were not admissible in evidence for the following reasons:

The letters were granted to the plaintiff below, Dec. 18, 1866, p. 19. She gave the defendants below notice and the proofs were taken and served on the Company *after that.* And yet no notice whatever is given of this record which had the effect according to the rulings of the Court solitary and alone to prove the death.

It wants no argument to show that the Company were prejudiced by the neglect to give notice of this important proof of which the plaintiff had full knowledge. This Court in Life Ins. Co. vs. Newton held such evidence inadmissible. If the evidence in question were competent, then the counsel of the Company, had they been informed of the letters, would have known it was competent, and would not have gone to trial relying on the fact that the burden of proof was on the plaintiff below, and on the fact that as the notice and proof show, there was no proof of death.

If the plaintiff below had served preliminary notice and proofs which did not show at what time the insured died or absented himself, the Court would not admit the plaintiff to establish a presumption of death by proving an absence of seven years, which, if true, the plaintiff was informed of and could have stated in the notice and preliminary proofs. It is just that surprise on the defendant below that the contract sued on guards against. And it is equally inadmissible to give in evidence letters of administration of which the plaintiff below had full knowledge, for the purpose of creating the presumption of death, without giving notice of such letters.

Relying on the burden being on the plaintiff below, the defendant went to trial and the plaintiff below failed to recover, and it was not until the second trial that this proof was unexpectedly sprung upon the Company and produced a verdict.

d. Again, it appears by the record that the plaintiff in error is a citizen of New Jersey, there organized and doing business, pp. 3 & 8; and that the letters of administration were granted by the Probate Court of Dubuque County, Iowa, p. 19.

It is a Common Law principle recognized in England and in the United States, that letters of administration are inoperative beyond the State or nation in which they were granted.

Because the granting of administration has a local jurisdiction—they are not noticed when emanating from a neighboring state.

Goodwin v. Jones, 2 Mass., 514.
Riley v. Riley, 3 Day, 74.

A personal representative deriving his power in that way will not be recognized as a party beyond the territorial jurisdiction where he has derived his power. Philips note, 621 and cases.

If the administratrix of Edgar Tisdale had a claim against the Mutual Benefit Life Insurance Company in New Jersey, she could not as administratrix there have sued them. If the Company paid her as administratrix, they would do so at their peril. A creditor of Tisdale could take out letters and compel the Company to pay again. Or if Tisdale proved to be in life, he could insist that the payment made had not satisfied the policy. If the letters are proof of death, it is only such proof against those who could recognize them as operative, and not against a foreign corporation. As these letters of administration granted in Iowa would neither prove the death or the intestacy of Edgar Tisdale, or the authority of his administratrix so as to protect the defendants in making payment, it can hardly be that they when unconnected with the purposes of representation can be invoked to prove the isolated facts of death, in this suit. It can hardly be that this can be the effect of letters taken out from any of the 2000 Probate Courts of the United States.

e. Again: The Probate Court of one's domicil has jurisdiction of granting letters of administration. A court within the jurisdiction of which the intestate neither had resided nor died, nor been possessed of rights nor property, has not jurisdiction to grant letters of administration.

The case shows that Edgar Tisdale's residence at the time of his death was [redacted], Minnesota, and it does not appear that he had either property or rights of property, or that he died in Dubuque County, where the letters were granted.

f. The defendant in error states in the brief that "it is now eight years since Edgar Tisdale was last seen or heard from; this long period establishes a presumption in law that he is dead."

To which we reply:

1. That this Court is engaged in a much more serious business than determining whether this insurance company shall or shall not pay a few thousand dollars. It is determining whether any of the numerous probate courts of the United States shall by its hasty and ex parte proceedings bind all the Courts of the United States, including this tribunal, to the presumption of intestacy and death, and the decision affect the property rights of all the citizens of the United States.

2. If Edgar Tisdale has not been seen or heard from in eight years, and this judgment is reversed, the plaintiff is sure of another judgment, and that at the expense of the defendant below.

3. We are only authorized by the statement of the brief of the defendant in error, to say that the information of the plaintiffs in error as to Edgar Tisdale not having been heard from, does not correspond with the statement of the defendant's brief.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1874.

No. 319.

THE MUTUAL BENEFIT LIFE INSURANCE CO.,

Plaintiff in Error.

vs.

HATTIE B. TISDALE,

Defendant in Error.

ARGUMENT

By GEORGE CRANE,

ATTORNEY FOR DEFENDANT IN ERROR.

DUBUQUE:

DAILY TIMES POWER PRINTING HOUSE.

1875.

SUPREME COURT

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THE MUTUAL BENEFIT LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

HATTIE B. TISDALE, DEFENDANT IN ERROR.

IN ERROR TO CIRCUIT COURT, DISTRICT OF IOWA.

ARGUMENT IN BEHALF OF DEFENDANT IN ERROR.

I.

The exceptions relating to the letters of administration, issued to Defendant in Error by the County Court of Dubuque County, Iowa, December 18th, 1866, raise the questions whether said letters of administration were properly admitted

in evidence; and if properly admitted, whether they were *prima facie* evidence of the death of Edgar Tisdale, as stated by the Court below in its charge to the jury.

(1). That they were competent as evidence of death, and *prime facie* evidence of that fact, see the following authorities viz:

26 Iowa, 170, Tisdale vs. Life Insurance Co.

10 N. H., 242, Jeffers vs. Radcliff.

10 Pick, 516, Newman, Adm'r. vs. Jenkins.

2 Wash. U. S. Ct. Ct., 201, Ketland vs. Adm'r. of Lebering.

70 Penn. St., 450, Cunningham vs. Smith Adm'r.

26 Barb, 383 and 397, Munro vs. Merchant.

47 N. Y., 308, Belden vs. Administrator, &c.

7 J. J. Marsh, 431, French vs. Frazer, Adm'r.

1 Vol. Greenleaf on Ev. (8th Ed.) §550 and cases there cited.

2 Vol. Greenleaf on Ev. (8th Ed,) §§ 278a 278b, 278c 278d, and 355.

28 Iowa, 12, Tisdale vs. Life Insurance Co.

(2). As the whole "scope and bearing" of the charge on this subject must be taken together, (Hollingsworth vs. Thompson, 7 Peters, 348), this Court will observe that the Court below permitted the jury to attach less weight to the letters than some of the authorities attach to them.

II.

The exceptions relating to the notice and preliminary proofs of death raise the question whether the time of payment had arrived prior to the commencement of this action, so far as their delivery to Plaintiff in Error was, if at all, made a condition precedent.

(1). They were admissible in evidences to show *what was*

delivered to Plaintiff in Error as notice and proofs of death. If the Company had regulations respecting notice and proofs of loss, and those delivered were defective, the Company should have pointed out the defects at the time, and could not at the trial allege defects for the first time, as a defense to the action.

(2). The charge of the Court to the jury enunciated correctly the rules of law applicable to the facts which the jury were authorized to find from the evidence.

The bill of exceptions recites as follows: "Upon said trial of said cause the defendant admitted in open Court that prior to April 1st, 1867 Plaintiff served upon and furnished to defendant the papers hereinafter set out as notice and proof of the death of said Edgar Tisdale. The plaintiff then introduced evidence tending to show that the defendant did not at any time, and had not at any time made any objection whatever to said papers, but that defendant declined and refused to pay plaintiff the amount specified in said policy of insurance, because defendant did not believe Edgar Tisdale was dead." (Record page 14).

Upon this subject the Court charged the jury thus: "If you find from the evidence that these so-called formal proofs were made, and no objection to them by the defendant, you will treat as waived the objection as to their insufficiency. In other words, it was the duty of the defendant, if they considered the formal proofs insufficient, to notify the plaintiff of that fact and require further proof; and if they put their objections to paying the money upon other grounds, they cannot now take advantage of the insufficiency of the proof." (Record pages 19 and 20).

That this instruction was properly given, see

9 How. (U. S. Sup. Ct.,) 390, Taylor vs. Ins. Co.

35 Md. 90, Ins. Co. vs. Doll.

51 N. H. 50, Taylor vs. Ins. Co.

58 Ill. 75, Ins. Co. vs. Hope,

Bliss on Life Insurance (1st Ed.) §§ 263, 264 and 265 and cases there cited.

May on Insurance, §§ 468 and 469 and cases there cited.

III.

It is now over eight years since Edgar Tisdale was last seen or heard from; this long period establishes a presumption in law that he is dead.

The trial under review was the second one had in this case; and as it was in all respects conducted according to settled rules of law, and resulted in a righteous judgment, we submit that an affirmance should be entered in this Court.

GEORGE CRANE,

Counsel for Defendant in Error.